

1 Amendment rights, and so yes. What would normally  
2 happen -- and, frankly, your Honor, the Government  
3 could simply do this. The Government could go to your  
4 Honor or to a magistrate with affidavits which  
5 establish probable cause that each of these nine  
6 individuals are material witnesses, seek warrants and  
7 then, essentially -- I mean, I'm not suggesting that we  
8 would actually want to have them arrested and detained,  
9 but we could seek to go out and secure their testimony  
10 through depositions. 3144, the material witness  
11 statute, specifically says those witnesses cannot be  
12 detained if a deposition can be taken to secure their  
13 testimony. And so I think that that's the context that  
14 we're in. And given the speed of these proceedings,  
15 perhaps it's best to look at these folks as material  
16 witnesses.

17 THE COURT: Can you point me to any case where  
18 that's been done pre-indictment?

19 MR. McADAMS: Yes, your Honor.

20 THE COURT: Okay. Which ones?

21 MR. McADAMS: I cited a case in the memorandum  
22 that I submitted this morning. It is United States v.  
23 Sharif, which was -- and the cite is 343 F.Supp 2nd  
24 610. It's a District Court decision out of the Eastern  
25 District of Michigan. And in that case, the

1 defendant -- excuse me, the Government obtained  
2 material witness warrants on three individuals and  
3 deposed them and then deported them, I believe, and  
4 subsequently indicted the defendant. And the Court  
5 approved that.

6 The quote that I have that I cited in the  
7 memorandum this morning is that, quote: (Reading:) The  
8 Government deposed three witnesses regarding  
9 defendant's complicity and the criminal charge, end  
10 quote, the day before that they were indicted.

11 And I think that Mr. Traini also noted in his  
12 memorandum, your Honor, the context in which material  
13 witnesses are more frequently deposed. I believe it  
14 was Footnote 3 of Mr. Traini's memorandum. He cited  
15 the Awadallah case, which I cited in my memorandum,  
16 which I believe is another instance where material  
17 witnesses were deposed pre-indictment.

18 Now, I don't entirely agree with all of the  
19 arguments Mr. Traini made in his footnote. He cites no  
20 authority for the proposition that that can only be  
21 done on the witness's request. I think 3144's plain  
22 language requires the Government to do a deposition  
23 rather than detaining a material witness, if it's  
24 possible.

25 THE COURT: What page of your memorandum is that

1 quote? I don't see it.

2 MR. McADAMS: My quote or Mr. Traini's footnote?

3 THE COURT: The quote from the Sharif case.

4 MR. McADAMS: It's on page three. It's the  
5 first paragraph that begins: Courts have approved  
6 these pre-indictment depositions. I cite Hayes and  
7 after that I note in Sharif, the Government deposed  
8 three witnesses regarding the defendants' complicity in  
9 the criminal charge the day before they were indicted.  
10 And I know I don't point out that that was material  
11 witnesses in that specific quote, but it's my belief  
12 that they are, that they were material witnesses in  
13 that case.

14 And your Honor, what we're essentially proposing  
15 here is to protect the Defendants' Sixth Amendment  
16 rights. One of the cases that both sides have been  
17 sort of bandying about is this Ninth Circuit decision  
18 Hayes, which the defense is relying on dicta in the  
19 dissent. The Government is noting that the majority  
20 approved it without deciding whether it was appropriate  
21 or not. I think that emphasizes the point that we're  
22 all aware of, which is there's not a lot of law on  
23 15(a) depositions in virtually any context, but  
24 particularly in a pre-indictment context.

25 But that case I think it's really important to

1 note was pre-Crawford. What we are trying to do here  
2 is balance the Defendants' rights under Crawford. As I  
3 said, we could have simply gone in an ex-parte  
4 proceeding to the magistrate, sought material witness  
5 warrants, taken these deposition, provided notice to  
6 the Defendants that we were going to do them without  
7 accommodating their schedule in any fashion, simply  
8 taken them. And that would have allowed us to proceed.  
9 But we in a good faith effort --

10 THE COURT: That would have allowed you to get  
11 the testimony before the grand jury. It wouldn't have  
12 allowed you to avoid Crawford.

13 MR. McADAMS: It would not have allowed us to  
14 avoid Crawford, exactly. And, therefore, we would have  
15 been faced with a dilemma of, okay, we can go out there  
16 and get this testimony without the Defendants being  
17 present -- well, if they appeared, then we would have  
18 or we would have had the argument, or we would have  
19 made the argument that they may have waived their right  
20 to cross-examine down the road at some future motion to  
21 suppress. But the issue of whether or not we can go  
22 out and take the depositions, we're discussing it as if  
23 it's the threshold issue. There's no question that we  
24 can go out and get depositions. The question is can we  
25 just come to the Court and seek your approval without

1 going and getting material witness warrants from the  
2 Defendant for the witnesses. So I think that there's  
3 no way that the Government can be prevented from  
4 deposing these folks. We can provide notice. They can  
5 appear and cross-examine.

6 THE COURT: No, but that's not the point. I  
7 understand the problem and the Ninth Circuit decision  
8 was pre-Crawford. Now, the Government is in a  
9 post-Crawford bind here, and you have a time problem  
10 because of the health issues with these individuals.  
11 I'm just not -- I understand the concern raised by  
12 Crawford, but I just don't know that because of  
13 Crawford do you now get to sort of convert material  
14 witness depositions into, essentially, trial testimony.  
15 And that's what's -- that would seem to be sort of an  
16 odd result of what Crawford was all about.

17 MR. McADAMS: Well, your Honor, I think that the  
18 issue would be whether or not they're admissible would  
19 be based on the Rules of Evidence. And under Rule 804,  
20 if the witnesses are truly unavailable at that point in  
21 time and they're reliable, you know, significant  
22 reasons to believe that it's reliable testimony, then  
23 the Court would address that issue in terms of  
24 admissibility at that point in time.

25 And I think that, frankly, with a lot of the

1 issues that counsel have raised with respect to taking  
2 these depositions or not taking these depositions are  
3 actually properly vetted in terms of whether or not any  
4 such depositions should later be admissible in some  
5 future proceeding if a trial actually results.

6 I mean, again, I emphasize that Rule 15 says  
7 that the Court has the authority in the interest of  
8 justice. And in this circumstance where exceptional  
9 circumstances and the interest of justice we are  
10 attempting to preserve this testimony for future trial  
11 recognizing that there's a possibility that that  
12 testimony might ultimately be suppressed, we're going  
13 to do everything we can to make sure that it is  
14 admissible, but I point, again, to the Mann case, which  
15 both myself and Mr. Traini cited as a First Circuit  
16 case from 1978. If the Court is concerned it's a close  
17 question, the Court should allow the deposition and  
18 then at a future point when it has a more complete  
19 record deal with its admissibility in part because I  
20 think Mann explicitly states that the harm comes to the  
21 defendant when the testimony is admitted at trial.  
22 There's no harm now to these targets.

23 THE COURT: To the extent you can discuss this  
24 given the provisions of Rule 6, why not indict these  
25 individuals if you think you are there? You're talking

1 as if the testimony needs to be preserved for a trial.  
2 You talk as if you clearly understand the trial  
3 testimony that you need from these people. And if it  
4 is all that clear, then why isn't it reasonable to  
5 believe that you've developed a theory of a case which  
6 could get an indictment from a grand jury?

7 MR. McADAMS: Your Honor, first of all, while  
8 this is in the context of grand jury proceedings, there  
9 has been no evidence before the grand jury. So the  
10 extent I divulged to the Court or any of the parties  
11 any information that we've learned, it's not 6(e)  
12 material. It's from agent interviews. And we have  
13 received evidence based in the context of agent  
14 interviews which lead us to the belief that at this  
15 stage, this very early stage of the investigation that  
16 there is a viable theory of prosecution, and that is,  
17 if I may summarize it, that the targets or some of the  
18 targets made false material representations to these  
19 terminally ill individuals in order to induce them to  
20 provide information and to sign documents including  
21 identity information, which was then used to perpetrate  
22 a fraud on these financial service companies. And so  
23 in essence, that's the nature of the fraud scheme.

24 And could we seek an indictment based on the  
25 interviews that we have at this point plus some other

1 documents? Quite possibly, your Honor. As the Court  
2 knows, the standard for getting an indictment is  
3 probable cause. That is not generally, although we  
4 have permissible, that's not generally how we operate.  
5 We don't like to bring charges against defendants  
6 unless we believe that we're going to be able to prove  
7 them at trial.

8 So what we are seeking to do here is not --  
9 excuse me, what we're seeking to do here is truly to  
10 preserve their testimony because let's say we go and  
11 seek an indictment from these folks, then based on the  
12 information that we have now, the defendant has now  
13 been publicly indicted and has been publicly charged  
14 with these crimes based on a good faith probable cause  
15 standard, and yet we may not have that testimony  
16 available at trial to prove. And the defendant -- in  
17 one case, your Honor, the Government submitted -- the  
18 Government knew that a witness, material witness,  
19 material not in the material witness warrant sense, but  
20 a key witness in the case was terminally ill, and the  
21 Government chose not to do a Rule 15 deposition. The  
22 case is McHan. The defense cites it. The Government  
23 instead uses at trial that witness's grand jury  
24 testimony and the Court admitted it as reliable  
25 testimony. And the defense in that case complained

1 that, look, our Sixth Amendment rights are violated.  
2 And the Court of Appeals upheld it. Now, that was,  
3 again, a pre-Crawford case.

4 So we would be in that situation where there's  
5 case law out there that says we can do it but in order  
6 to protect the defendant's Crawford rights, we think  
7 the appropriate way to do it is -- and also to not make  
8 an indictment of these targets that we're not going to  
9 be able to prove at trial regardless of the fact that  
10 we may have a good faith reason to bring it at the  
11 grand jury stage, we are attempting to do, to secure  
12 their testimony for trial so that it's available at  
13 that point. And not only secure it at trial, but so  
14 the defendants have an opportunity to cross-examine  
15 those witnesses.

16 THE COURT: It seems to me you might be cutting  
17 off your nose to spite your face, in a way. Maybe  
18 that's not the right term, but by rushing this  
19 pre-indictment, you may inadvertently be giving the  
20 targets a better argument to exclude the evidence when  
21 it comes time for trial because you did all this  
22 pre-indictment, if I were to allow it.

23 MR. McADAMS: I understand that, your Honor. If  
24 we don't do this, these people will die. They will not  
25 be available. And so -- I mean, 112 people, 9 are

1 \ alive at this point. And that's only since -- we've  
2 been looking at this case for a couple of months, your  
3 Honor. So they are going to die. Every single person  
4 that has been involved in this scheme was a person who  
5 was identified by the targets, again, allegedly, on the  
6 basis of the fact that they were terminally ill. They  
7 were going to die soon. So we may be providing  
8 arguments for the defense down the road.

9 On the other hand, if we go and simply obtain  
10 the indictment and then are unable to prove the case at  
11 trial because we didn't have this testimony, I think --  
12 I don't think it's beyond the scope of logic that the  
13 defendants will cry bad faith, that the Government  
14 didn't seek to preserve their testimony for trial, went  
15 out and made unsustainable allegations against their  
16 clients. The counsel for the defense has already  
17 implied that the Government is improperly conducting an  
18 investigation and threatened to refer us to the Office  
19 of Professional Responsibility in an investigation  
20 that's mere weeks old.

21 THE COURT: Well, no one could say that you're  
22 not trying. If I were to deny this motion, you would  
23 have certainly tried to do it pre-indictment, and none  
24 of the targets could claim that you didn't expend every  
25 effort to try to get this information prior to bringing

1 an indictment. And actually, it would be by virtue of  
2 their efforts that they stopped you from doing so.

3 So it would be kind of hard, I think, for them  
4 to complain that you failed to secure the testimony  
5 pre-indictment if they're the ones that stopped you  
6 from doing so.

7 If you then move forward, got the indictment,  
8 and then sought to preserve the testimony for trial,  
9 seems to me the Government is in a much safer position  
10 in terms of the admissibility of that testimony at  
11 trial.

12 MR. McADAMS: That may be, your Honor. Another  
13 option that would be available to the Government, as  
14 we've discussed briefly, is seeking material witness  
15 warrants in order to secure their testimony. So I  
16 don't really have a response to the point your Honor is  
17 making. I think that's something the Government would  
18 have to consider, and we don't make indictment  
19 decisions, you know, on the fly, respectfully, your  
20 Honor, so that's not something I'd be prepared to,  
21 frankly, elaborate more on than I just have.

22 THE COURT: Right. Now, what do you say to this  
23 argument that Rule 15 just historically does not  
24 contemplate the use of this tool by the Government? I  
25 think it was pointed out by counsel that Rule 15

1 originally was really only for defendants to secure  
2 this testimony.

3 MR. McADAMS: I don't deny that that's the  
4 history, your Honor. I looked at the history of the  
5 Rule, and there is a long history of efforts by  
6 Congress and the Rules Committee to provide this avenue  
7 to the Government through a period of many, many years,  
8 in which several times the Rule got to the Supreme  
9 Court and the Supreme Court, without comment, I believe  
10 without comment on any instance, did not approve the  
11 use of the Government having the Rule 15 option  
12 available. That changed some nearly 40 years ago in  
13 1970 I think was the first time that the Government was  
14 able to have the rule. And then subsequently, it's  
15 been broadened.

16 So I guess one point to make is I'm not going to  
17 deny that historically that was an issue. On the other  
18 hand, the law is now the Government does have this  
19 available. I think that the language of the Rule  
20 anticipated that it would be primarily used in the  
21 post-indictment context. That said, I think, clearly,  
22 Rule 46 clearly anticipates in a pre-indictment context  
23 that Rule 15 depositions are going to be taken because  
24 it says pending indictment right in Rule 46 that a Rule  
25 15 deposition may be taken of a material witness.

1           So I think that the focus that the Court should  
2     be looking at on Rule 15 is the language that says: In  
3     exceptional circumstances and in the interest of  
4     justice. And that is what the Government is telling  
5     the Court we are in right now, very exceptional  
6     circumstances where witnesses are literally dying; and  
7     in the interest of justice, in order to prevent what  
8     may very well be -- what would be a miscarriage of  
9     justice and, frankly, the alternative of rushing to  
10    indict the Defendants is not necessarily a better  
11    outcome in the interest of justice, whereas in this  
12    context these proceedings would be -- are not public.  
13    There's no public charge against the Defendants. The  
14    Government and the Defendants can continue through the  
15    process subsequent to the depositions to have  
16    discussions about their materiality in terms of the  
17    crime that would be alleged and so forth.

18           So I think that, frankly, this is the safest  
19    route for the Defendants and that's why we have come to  
20    the Court seeking approval rather than taking the more  
21    aggressive route that we are entitled to.

22           THE COURT: So if the shoe was on the other  
23    foot, let's say that the Defendants felt that these  
24    individuals would be helpful to their case, even though  
25    they haven't been indicted, are you saying that the

1 Government would agree that a Defendant could -- I  
2 mean, a target could secure trial testimony pending  
3 prior to indictment under Rule 15?

4 MR. McADAMS: I think it's a very tricky  
5 situation. I know that there are a lot of cases out  
6 there in which defendants have sought to do that and  
7 courts have said no. I know in another case before  
8 your Honor we addressed a similar issue in terms of  
9 defendants seeking to depose Government witnesses. I  
10 think that it may very well be that the Government  
11 would oppose it. I think that in every one of these  
12 cases, and I think the case law says that, the Court  
13 should make a close, fact-based case-by-case scenario  
14 decision.

15 THE COURT: Well, just take exactly the same  
16 facts.

17 MR. McADAMS: I don't see what harm there would  
18 be to the Government in preserving the testimony of a  
19 witness at this point. In fact, frankly, when counsel  
20 for Mr. Caramadre and the Defendant and the Government  
21 were discussing these depositions up until the day,  
22 frankly, of the chambers conference the other day,  
23 counsel for Mr. Caramadre had indicated there may be  
24 some additional witnesses that he wanted to do Rule 15  
25 depositions on, and we had indicated that we would be

1 willing to do that.

2 THE COURT: Slow down a little bit.

3 MR. McADAMS: I apologize, your Honor.

4 So we certainly had taken the position with  
5 counsel for Mr. Caramadre that that would be  
6 permissible, we were not going to oppose that.

7 So if they have folks that they want to go and  
8 depose, in this specific case, given the extreme nature  
9 of this, of these circumstances, the Government would  
10 have been amenable to that. I'm not going to take the  
11 position that in every other case we would do that. I  
12 can't answer that.

13 THE COURT: Now, are you in a position to speak  
14 to the physical condition of these individuals?

15 MR. McADAMS: I think Mr. Vilker is in a better  
16 position than I am to do that, your Honor.

17 THE COURT: All right. Mr. Vilker, just before  
18 we give the targets a chance to talk about all this,  
19 could you just address that?

20 MR. VILKER: Thank you, your Honor. We put the  
21 witnesses, the proposed deponents in order, based on  
22 how severe we believe their situation is now.

23 The first person we'd like to depose is [REDACTED]  
24 [REDACTED] Westerly. We have before the  
25 Court, and I'm happy to hand up to the Court a letter

1 from the VA where he is receiving treatment, which says  
2 that he has been diagnosed with non-small cell lung  
3 cancer metastatic to the adrenal. He has very limited  
4 survival. His expected survival is in the months. And  
5 when his symptoms get worse, he will be a candidate for  
6 hospice care. He's met several times with the FBI  
7 agent who is reporting that his health is  
8 deteriorating. And according to her view, if we don't  
9 take his deposition in the next week or two, that will  
10 be the end of [REDACTED] unfortunately.

11 The next individual is [REDACTED] He  
12 has -- by the way, [REDACTED] we've talked to him  
13 about the deposition. We are very sensitive to the  
14 potential stresses it will add to their lives and that  
15 is definitely one factor we are considering. If we get  
16 to the point where this is approved and we're closing  
17 in and if their health situation deteriorates and we  
18 believe that this would cause too much stress for them  
19 and their families, then we will in all likelihood  
20 refrain from taking those particular depositions. But  
21 up to now, [REDACTED] has indicated that he has no  
22 objection to his deposition being taken.

23 The next individual is [REDACTED] He has  
24 terminal -- he's 33 years old. He has terminal  
25 osteomyelitis. This is a disease infecting the bone

1 that resulted from him being shot several years ago.  
2 We have -- he informed the agent that doctors told him  
3 in November 2007 that the disease had progressed to his  
4 pelvis and that he had six months to three years to  
5 live. He's paralyzed and confined to a hospital bed.  
6 He also indicated that he has no objection to his  
7 deposition being taken now.

8 The third individual on our list is [REDACTED]  
9 [REDACTED] He has lung cancer. He has now gone back  
10 into Miriam Hospital with pneumonia in his lungs. He  
11 and his wife both told the agent that he's terminally  
12 ill and they're not sure how much longer he has to  
13 live. When he was told about the possible depositions,  
14 he indicated he would be amenable to it but he would  
15 not be able to go to court, were his words.

16 The fourth individual is [REDACTED]  
17 of North Providence. He has emphysema and lung cancer.  
18 We have a fax from the VA indicating that he has  
19 metastatic lung cancer and pulmonary disease. He was  
20 diagnosed with lung cancer ten years ago. Three and a  
21 half years ago, doctors gave him seven months to live  
22 and no one can figure out how he's still alive.

23 The fifth individual is [REDACTED] of  
24 Coventry. His wife told the agent that three years ago  
25 Mr. Sanford was diagnosed with emphysema and chronic

1 pulmonary disease. Three years ago he was put on  
2 hospice care and was given six months to live. We have  
3 a note from his doctor, and I'm happy to hand up all  
4 this evidence, that he suffers from chronic emphysema.  
5 We're trying to get additional documentation. He's  
6 going through an additional personal crisis now. His  
7 daughter, who is 55 years old, had a -- just had a  
8 stroke and she's in the hospital. And given this  
9 situation, the family has expressed some hesitancy  
10 about taking these depositions now. It's something  
11 we're sensitive to, and we're hoping that as time goes  
12 on that that particular situation resolves itself. And  
13 if it doesn't, the Government will honor their wishes  
14 and skip the deposition if the Court authorizes them.

15 The sixth individual is [REDACTED] He's 86  
16 years old. We have a letter from his doctors listing a  
17 whole long list of cardiological problems that he has.  
18 He's indicated that he has no problem having his  
19 deposition taken.

20 The seventh individual is a man in Las Vegas,  
21 who just moved to Las Vegas a couple of years ago. He  
22 got involved in this while he was still in Rhode  
23 Island. He's [REDACTED] He is 62 years old. He  
24 is terminally ill with heart failure. We have a report  
25 of an interview that an investigator for an insurance

1 company did with him in which he reported that he was  
2 told several months ago that he only had three months  
3 to live, that he's diagnosed with heart failure and the  
4 left side of his heart is entirely dead. He needs a  
5 heart transplant to survive but he cannot get one.

6 The eighth individual is [REDACTED] of  
7 Cumberland, Rhode Island. He has Stage IV stomach  
8 cancer. He told the agent that he is dying. Just  
9 yesterday the agent spoke with him. He went back to  
10 the hospital and the cancer has returned and what they  
11 had thought was a temporary remission has now ended.  
12 He also indicated that he has no problem with having  
13 his deposition taken.

14 The ninth individual is a man named [REDACTED]  
15 [REDACTED] who is 67 years old from Woonsocket. He's  
16 terminally ill with emphysema, and we've been unable to  
17 get any further information from him since the past  
18 chambers conference.

19 There's really, respectfully, not going to be a  
20 viable argument that this is not an exceptional case  
21 with exceptional circumstances. These are nine very  
22 important witnesses who will all be dead in the next  
23 few months.

24 And your Honor, if I might address, I understand  
25 the concern you raised about how will the Defendants